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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

INTERNATIONAL AIR TRANSPORT ASSOCIATION AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION	Docket OST-95-232 - 33

With cross reference to:

AIR TRANSPORT ASSOCIATION OF AMERICA AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION	Docket OST-96-1607 - 6

RESPONSE OF THE VICTIMS FAMILIES' ASSOCIATIONS TO APPLICATION OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND RELATED EXEMPTION RELIEF AND MOTION FOR LEAVE TO FILE A LATE PLEADING

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MOTION FOR LEAVE TO FILE A LATE PLEADING

Pursuant to 14 C.F.R. 302.17, the Victims Families' Associations[1] respectfully move the Department of Transportation for leave to file a late pleadings and respectfully request that the within pleading be included in the above-captioned docket.

On behalf of its individual members, Victims Families' Associations make the following comments on the Application of the International Air Transport Association (IATA) for Approval of

[1] This pleading is filed on behalf of the American Association for Families of KAL 007 Victims; the Families of Pan-Am 103 at Lockerbie, Scotland; and the Families of the TWA 800 Disaster. The undersigned acknowledges that not all families of the disasters may agree with all of the statements contained herein but assures the Department that one or more of the members of each of the Associations has retained the undersigned to express these views.

Agreement, Antitrust Immunity and Related Exemption Relief and further request that the Department require modification of the proposed Intercarrier Agreement on Passenger Liability ("IIA") and the Agreement on Measures to Implement IATA Intercarrier Agreement ("MIA") as more specifically set forth below.

I. INTRODUCTION

The families of victims of air disasters which are governed by the Warsaw Convention[2] ("the Treaty") have a significant interest in the Application currently before the Department of Transportation because it effects the rights and remedies that families may have available in the future in the Treaty regime. Since the identity of future victims and their families cannot be known, it is incumbent on the families of the victims of past disasters to state their opinions on issues that may effect like-situated families in the future. The Victims Families' Associations agree with IATA that there has been a failure at the governmental level to correct the low limitations of liability and the need for the claimants to prove willful misconduct in order to obtain compensation in excess of the limit of liability. The revisions of the Treaty and/or unilateral implementation of a passenger-financed administratively complex supplemental compensation plan have not succeeded. The Victims Families' Associations agree that the process proposed by IATA to obtain

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[2] Convention for the Unification of Certain Rules relating to International Transportation by Air, October 12, 1929 49 Stat. 3000, T.S. 87C (1934).

approval of the Department pursuant to Part 303 of the Department's Regulations and 49 U.S.C. §§ 41308 and 41309 is an appropriate vehicle to achieve the ameliorative corrections of the current Treaty system. However, the MIA submitted by IATA to the Department is merely a generic boilerplate document with several optional provisions which does not indicate which provisions each carrier is willing to sign. Once the implementative document(s) is filed, the Victims Families' Associations reserve the right to make further comment. Therefore, the Victims Families' Associations do not believe that the IIA and MIA adequately address all issues and that further modification of the IIA and MIA should be required.

II. BACKGROUND

The Victims Families' Associations generally agree with the IATA recitation of the events leading up to the Application as background material. However, the Victim Families' Associations also remind the Department that, in its first Order granting discussion authority, the Department set out guidelines to govern any Agreement to improve the Warsaw system as follows:

> [F]irst, with regard to passenger claims arising from international journeys ticketed in the United States, passengers should be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in the United States in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and

permanent residents traveling internationally on tickets not issued in the United States.[3]

Neither the IIA nor the MIA achieve these goals in their present forums and the IATA carriers should be required to agree to provisions that effectuate these goals.

III. SPECIFIC PROVISIONS

A. Generally

The Victims Families' Associations' generally applaud the efforts of IATA and its member carriers to change the Warsaw system. However, they note that the generic MIA submitted by IATA is merely a proposal that permits the carriers to make several selections of options and, thus, are not finalized documents that would give the Department the opportunity to understand exactly with what the non-American airlines will comply. Declarations of generalized intent are not adequate for the Department or the traveling public to ascertain the full scope of the non-American carriers' agreements to fulfill the ameliorative intent of the changes in the Warsaw system.

The Victims Families' Associations note that the DOT has the authority to require non-American carriers to comply with DOT Orders before granting them permission to have access to the United States airspace. See e.g., 1966 Montreal Agreement, Agreement C.A.B. 18900, 23680 May 13, 1966. To permit IATA carriers to merely make suggestions of a generic agreement will do nothing to

[3] Order 95-2-44 at 3

significantly fulfill the stated purpose that the first Order granting discussion authority was meant to achieve, i.e., prompt and complete compensation on a strict liability basis with no passenger limits and extension of coverage to all U.S. citizens and permanent residents regardless of the place of purchase of the passenger ticket. Rather, the DOT should require IATA member carriers to specifically commit to the provisions that fulfills those goals prior to permitting them access to American markets.

B. The IIA

For the reasons set forth above, the Victims Families' Associations believe that it is inappropriate to leave to the individual carriers the conditions of carriage and tariff filings with options that the carrier alone selects. Rather, the DOT should require mandatory provisions.

1. PARAGRAPH 1 of IIA

Paragraph 1 permits the carriers, at their option, to either waive Article 22.1 limits on compensatory damages entirely or elect a narrower waiver which would only remove any barrier to recovery in accordance with the domiciliary law. The only mandatory obligation under this paragraph is to remove any Article 22.1 limitation only insofar as to damages that would be available in accordance with the passengers' domicile. The provision as it stands in its only mandatory form forces the claimants to accept a choice of law as the law of the domicile without reference to other options. It is significantly more restrictive than the current system which permits claimants' choice of forum and the

concomitant choice of law. For example, the law of the place of the domicile of the carrier may be more favorable to the claimant and may be selected under Article 28 in the current system but would be foreclosed under Paragraph 1 even though there would be no prejudice to the carrier to have compensation assessed in accordance with its chosen home.

The Victims Families' Associations suggest that the language of the ATA-suggested Implementing Provisions Agreement (IPA), subparagraph (I)(4) is more acceptable in that it permits compensatory damages to be determined by reference to the law of the passenger's domicile or permanent residence but does not bind the claimant to this choice of law.

Furthermore, on a more basic level, it is the Victims Families' Associations' position that the carriers should be required to waive the Article 22.1 limits entirely and not be permitted to have piecemeal waivers.

2. PARAGRAPH 2 of IIA

Paragraph 2 of IIA also provides that the carrier may elect either to waive any of its defenses under Article 20.1 and 21 either in its entirety or "up to a specified monetary amount of recoverable compensatory damages." Such an option is not in accordance with the DOT Order granting discussion authority which establishes the policy that passengers who purchase their tickets in the United States should be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and has no ceiling for recovery of compensation on an

absolute liability basis. If the purpose of the IATA members is genuinely to make it easier, more expeditious, and less expensive for families of persons killed or persons injured in international air travel and to provide fair compensation, the options allowable under the current Paragraph 2 of the IIA do not achieve that goal. See also, Section III(C)(1)(a), infra.

3. PARAGRAPH 3 of IIA

This Paragraph reserves the right of recourse including rights of contribution or indemnity, against any other person with regard to any other sums paid by the carrier. The Victims Families' Associations support this provision.

4. PARAGRAPH 4 of IIA

This Paragraph obligates the participating carriers to encourage other airlines involved in international air carriage. The Victim Families' Association support this Paragraph.

5. PARAGRAPH 5 of IIA

This Paragraph sets a November 1, 1996 implementation date provided that requisite government approvals are secured by that date. The Victim Families' Associations encourage the Department to implement the Application (with the suggested modifications) on that date or as soon thereafter as is feasible.

6. PARAGRAPH 6, 7 and 8 of IIA

The Victims Families' Associations take no position on these Provisions.

C. The MIA

The MIA, like the IIA, permits the carriers to select options. Again, this does not fulfill the Department's stated policy to provide full compensation without monetary limits on a strict liability basis and to permit equal treatment for all American citizens and permanent residents regardless of where the tickets were purchased. Specific comments are noted below.

1. MANDATORY PROVISIONS

Paragraph I.1 of the MIA waives the Article 22(1) limitation on damages for recoverable compensatory damages arising under Article 17 of the Convention. The Families Association agrees with the principle of Paragraph I.1 but disagrees with the limitations contained in Paragraph I.2.

a. Paragraph I.2 of the MIA

This Paragraph requires each participating carrier to relinquish any defense under Article 20(1) of the Convention with respect to that portion of the claim that does not exceed 100,000 SDRs. The Victim Families' Associations suggest that the policy annunciated by the DOT in its Order granting discussion Authority is unfulfilled by limiting waiver of the "all necessary measures" defense of Article 20(1) only to damages that do not exceed 100,000 SDRs. It is suggested that the Department require that the IATA Application be modified to require adoption of a provision such that the air carrier is absolutely liable to the claimants without regard to any Article 20(1) defense, i.e., that it be a one level source of liability.

Because one of the primary goals of the Department is to protect American citizens engaged in air transportation and because assessment of damages following injury or death necessarily involves the judicial systems worldwide, it is important that the Department understand the practical importance of IATA's proposal not to waive the defense of non-negligence for amounts in excess of 100,100 SDRs.

American tort law is a fault-based system. Its lawyers and judges are familiar with negligence concepts and the breadth of duty imposed on the air carrier to properly fulfill its duty to safely transport the passengers from point of origin to point of destination. To that end, it is highly unlikely that the distinction of the non-waiver of the defense of "all necessary measures" for amounts in excess of the first tier would have any significance to claims assessed in an American court.

The same is not true worldwide. The American common law negligence system is but one of a variety of judicial philosophies adhered to across the globe. It is suggested that in the vast majority of countries, the distinction between the waiver and non-waiver would be significant and would most likely result in a denial of compensation in excess of the first tier in many cases.

It is not the Department's function to comment on the validity or harshness of other countries' jurisprudence. It is, however, the Department's duty to address the concerns of American citizens and permanent residents. Therefore, it is critical that, if the Department permits the IATA carriers to maintain a non-waiver of

the Article 20(1) defense for amounts in excess of the first tier of recovery, it also require that venue be permitted in American courts for American citizens where personal jurisdiction can be maintained against the carrier in these courts. Only in this manner can the goal of full compensation be achieved for American passengers.

The Victims Families' Associations strongly urge that the Department require that the waiver of the monetary limit be on the entire amount of compensation or, if a two-tiered approach is approved, to insure that American citizens and residents have access to American courts.

Also, if the DOT approves a two-tiered source of liability, i.e., the carrier waives its Article 20(1) defenses for the first amount of recovery, but retains the Article 20(1) defense for any excess, the Victim Families' Associations suggests that the cut-off point be 250,000 SDRs. Specifically, the Victim Families' Associations suggest that the carriers be required to waive their Article 20(1) defenses for recoveries up to 250,000 SDRs while retaining its Article 20(1) defense in excess of 250,000 SDRs, but only if the Department accepts a two-tiered system of recovery. The amount of 250,000 SDRs is approximately the present value of the $75,000 limit established under the Montreal Agreement in 1966 when increased by inflation using acknowledged economic indicators from the International Monetary Fund.[4]

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[4] The fact that 250,000 SDRs is approximately the equivalent of $75,000 in 1966 dollars is further support for the argument that the Department should either require full waiver of Article 20(1)

The Victim Families' Associations also feel that it is important if the two-tier approach is accepted by the Department that the Department acknowledge the historic change in the value of money by requiring that the tier cut-off (i.e., 250,000 SDRs) be increased on an annual basis by an economic indicator that equivalates the value of future funds to the present day 250,000 SDRs.

b. Paragraph I.3

This Paragraph reserves all of the other Convention defenses and preserves all rights of recourse against any other entity for contribution and indemnity. The Victim Families' Associations take no position with regard to this Paragraph.

2. OPTIONAL PROVISIONS

a. Paragraph II.1

Paragraph II.1 of the MIA forecloses the carrier's opposition to a claimant's effort to persuade a forum court to choose "the law of the domicile or permanent residence of the passenger" to govern the determination of recoverable compensatory damages. The Victim Families' Associations supports the precept but believe that this Provision should be made mandatory for any carriers accessing United States' airspace. Once mandatory, it provides that the claimant may assert domiciliary law in addition to any other choice of law jurisdiction that may be applicable and potentially increases the options of the claimants.

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defenses or require venue in American courts for American citizens. Otherwise, there is not real advantage to the passengers under the IATA Application.

b. PARAGRAPH II.2

This option permits the participating carrier to vary the level of the Article 20(1) defense waiver on a route-by-route basis where "authorized by governments concerned with the transportation involved". The Victim Families' Associations feel that this limits the ameliorative effects of the Application, particularly where the Application does not provide for a fifth jurisdiction such that the claimant may always sue in his or her home country where personal jurisdiction can be obtained over the carrier. The Department's original Order granting discussion authority set a policy that unlimited compensation should be extended to U.S. citizens and permanent residents regardless of the place of ticket purchase, i.e., establish a fifth jurisdiction under Article 25. The Victims Families' Associations strongly support the establishment of the fifth jurisdiction and suggest such be a mandatory provision agreed to by the carriers before any permission to use American airspace be granted. Without the availability to sue in a claimant's home country, an American passenger on international flights not beginning or ending in the United States and in which the tickets were not purchased in the United States, would be subject to a variety of different possibilities of recovery provisions based upon the route-by-route unilateral choices by the carrier. Thus, the Victims Families' Associations cannot condone to this provision.

In this regard, the Victims Families' Associations strongly urge the Department to require the carriers' agreement

that American citizens and permanent residents be permitted to sue in the United States where personal jurisdiction can be obtained against the carrier, regardless of place of ticket purchase. Americans travel worldwide for business, pleasure, and philanthropic reasons to the economic advantage of the foreign air carriers. If these carriers do business in the United States and take advantage of the American market, it is only equitable that American passenger's damages be assessed in accordance with their home's standards.

c. Paragraph II.3

This Paragraph addresses particular cases in which "public social insurance or similar bodies" provide payments to the "passenger or his dependents". As there are no such public social insurance agencies in the United States, the Victims Families' Associations take no specific position with regard to this Paragraph. However, on behalf of the families of passengers in countries that do have provisions, it appears inequitable to offset the carriers' financial responsibility by social services which may have been funded by the passengers' taxes.

d. Paragraph E Additional Provisions and Housekeeping Provisions

The Victims Families' Associations take no position with regard to these provisions.

III. VENUE

The Victims Families' Associations have commented several times in this Response about the necessity of establishing venue in American courts for American citizens and permanent residents where personal jurisdiction can be obtained against the carrier. This concept has been called by some the "fifth jurisdiction" in a reference to Article 28 of the Treaty which provides for venue in the following places: the domicile of the carrier, the principal place of business of the carrier, the carrier's place of business where the contract of carriage was made (the place the ticket was purchased), and the place of destination. In reality, there are only two venues. In virtually 100% of cases, the carriers' domicile and principal place of business are the same. The vast majority of international air travel tickets are roundtrip, returning the passenger to the place where he purchased the ticket. Thus, the last two venues are, in most cases, the same. The passengers' options are, therefore, genuinely limited.

American air carriers can always be sued in American courts, given that this country is their domicile and principal place of business. International air carriers, however, are permitted access to the American market to obtain fares from American citizens, but actively resist the jurisdiction of American courts under the current system unless venue lays under one of the provisions of Article 28. The injustice can be best perceived by relating real life circumstances that happened to American citizens in past litigation.

A young American college girl wants to visit her parents who are in Japan for a year on temporary duty with her father's company. Her parents buy her a ticket in Japan on a non-American carrier which will then take her to France, her final destination, where she is to study for a year. She boards the plane in New York and is killed on the way to Japan. No American jurisdiction.

American tourists buy a European travel package, beginning and returning to the United States. While in Germany, they are told that the Swiss Alps are not to be missed. They decide on a two-day excursion to Innsbruck and purchase tickets in Germany on Swissair. They are killed. No American jurisdiction.

An American businessman is on a planned business trip to Tokyo when he learns of the possibility of additional sales in Korea. He buys a ticket in Japan on Korean Air Lines. He is killed. No American jurisdiction.

Or consider the American college students studying in Europe for a year. The Christmas holidays approach and they're homesick and want to go home for the holidays. They buy roundtrip tickets in England to return after the new year. If they choose British Airways as a carrier, no American jurisdiction. If they choose Pan-Am, American jurisdiction.

It is unequitable to deny the access of American courts to American citizens just because of choice of carrier, or of a change of plans, or because one is homesick. Such passengers are not expatriots permanently residing overseas but Americans who, by happenstance, do not buy tickets in the United States. The non-

American carriers compete mightily for the American passengers' dollars. They should be held accountable in American courts.

Lest there be any misunderstanding, the American venue would only be available against carriers that do business here. The American court system requires that personal jurisdiction be obtained over a defendant, i.e., that defendant must do substantial business here.

For all of the foregoing reasons, the Victims Families' Associations request that Department address the venue issue even though it was not proposed in the IATA Application.

CONCLUSION

For the reasons stated specifically herein, the Department should require mandatory provisions in accordance with the issues discussed herein.

Dated: August 22, 1996

Respectfully submitted

SPEISER, KRAUSE, MADOLE & COOK

By Juanita M. Madole
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Response of the Victims Families' Associations to the Application of the International Air Transport Association of America for Approval of Agreement, Antitrust Immunity and Related Exemption Relief and Motion for Leave to File a Late Pleading** was mailed on August 22, 1996, to the parties listed on the attached Service List.

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